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Supreme Court, U.S.
FILED
OCT 7 - 2009
OFFICE OF THE CLERK

No. 09 09-506

In The
Supreme Court of the United States

The Children's Fund et al.,
Petitioners,

v.

Springfield Holding Co. Ltd. LLC et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Constitution of the United States forbids the courts of the United States from issuing "unpublished" decisions that are not admitted to be precedents.

2. Whether a managing partner of a partnership who has been found by a court of law to have: (a) drafted and used "severely deficient" documents in a self-serving disputed transaction with minority partners, (b) shown "a general lack of credibility," and (c) come to court with "unclean hands" has fulfilled the duties of a managing partner under the Uniform Partnership Act.

3. Whether the mandatory accounting provisionof the Uniform Partnership Act is fully satisfied when the minority partner in a disputed transaction is allowed to sit in court to listen to the disputed, hostile testimony of a professional witness with

whom he has never spoken, whom he did not approve, and who was paid for his testimony only by the managing partner.

4. Whether minority partners under the Uniform Partnership Act may waive the duties of the managing partner.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE-DISCLOSURE STATEMENT

The parties before this Court are the same as the parties to the proceeding in the court below. Petitioners include the Children's Fund, an Illinois Limited Liability Company (which owns and operates a private school in Chicago, Illinois), and Robert L. Stone, Cynthia A. Stone, and Robert Stone, M.D. (managers of the Children's Fund). Petitioners are investors and minority partners in Springfield Holding Co. Ltd. LLC, an Oklahoma limited-liability

company (which owns and operates commercial real estate in Oklahoma) Petitioners were the defendants and appellants below.

Respondents include Springfield Holding Company Ltd. LLC; David H. Kinnard (majority partner and managing partner of Springfield Holding Co. Ltd. LLC); Roger L. Kinnard (his brother and fellow majority partner); and Mark Reinitz (their employee). Respondents were the plaintiffs and appellees below.

No publically traded entity owns more than a 10 percent interest in either The Children's Fund or Springfield Holding Co. Ltd. LLC.

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The Children's Fund, Cynthia A. Stone, Robert L. Stone, and Robert Stone M.D. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the 10th Circuit.

DECISIONS BELOW

On August 25, 2008, the District Court for the Western District of Oklahoma entered a "Judgment" in favor of Respondents and against Petitioners, together with a "Findings of Fact and Conclusions of Law." On June 8, 2009, the Court of Appeals for the Tenth Circuit entered an (unpublished) "Order and Judgment" affirming the district court's judgment. On July 15, 2009, the Court of Appeals, without filing an opinion or giving reasons, entered an "Order" denying Petitioners' Petition for rehearing. Petitioners are seeking a writ of certiorari to review the "Order and Judgment" of June 8, 2009 and the "Order" of July 15, 2009.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2009. The court below denied a rehearing on July 15, 2009. This Petition is due on or before October 13, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Uniform Partnership Act ("UPA") provides:

> §204(4). Rules of Construction.
> This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those sates which enact it.
>
> §205. Rules Governing.
> In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.
>
> §219. Partnership Books.
> The partnership books shall be kept . . . at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.
>
> §220. Duty of Partners to Render Information.

> Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . .
>
> §221. Partner Accountable as Fiduciary..
> (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
>
> §222. Right to an Account.
> Any partner shall have the right to a formal account as to partnership affairs: (a) if he is wrongfully excluded from the partnership business or possession of its property by his copartners . . . or (d) Whenever other circumstances render it just and reasonable.

Article III, Section 1, Clause 1 of the Constitution of the United States provides:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish.

The Fifth Amendment to the Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Respondents are an Oklahoma LLC and its managing partners, who own and control multiple apartment complexes in Norman, Oklahoma. Petitioner The Children's Fund is an Illinois LLC, and Petitioners Cynthia Stone, Robert L. Stone, and Robert Stone M.D. are citizens of Illinois who were induced by Respondent Roger Kinnard to invest in Springfield Holding Company. Petitioners are minority partners in Respondent Springfield Holding Company Ltd. LLC. Jurisdiction below was based on diversity of citizenship. In a disputed transaction, Respondents claim that Petitioners transferred all of their shares to Respondents.

With regard to the disputed transaction, Petitioners alleged (and fully briefed) multiple violations of the Uniform Partnership Act ("UPA"), which contains a right to a mandatory accounting at the de-

mand of any partner and imposes fiduciary duties on all managing partners with regard to their dealings with minority partners. The district court found that Respondents, who controlled all partnership actions, had (a) drafted and used "severely deficient" documents for use in the disputed transaction, (b) shown "a general lack of credibility," and (c) came to court with "unclean hands." Nevertheless, after finding those facts, the district court granted Respondents' every prayer and ruled that Respondents may keep all of the disputed shares—because the Petitioners had unintentionally waived all of the Respondents' duties toward minority partners under the UPA.

At trial, Petitioners were permitted to sit in court to listen to the disputed, hostile testimony of a professional witness with whom they had never spoken, whom they did not approve, and who was

paid for his testimony only by the Respondents. The district court then denied Petitioners" prayer for an independent, certified accounting.

In other words, the district court either radically reinterpreted or disregarded the State law that, under the *Erie* doctrine,[1] it is required to apply in cases of diversity jurisdiction.

Petitioners made a timely appeal to the United States Court of Appeals for the Tenth Circuit, which affirmed the district court's opinion, while ruling that its own decision has no value as a precedent in other cases. Petitioners then filed a timely petition for a rehearing, setting forth the same argument presented in this Petition for Certiorari. The Court of Appeals denied that petition summarily without any opinion and without giving any reasons.

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[1] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Before the case at bar, there had been no ambiguity in the case law interpreting the UPA. In all other circuits, the UPA is vigorously enforced. For example, minority partners' right to an independent, certified accounting is so important that a Temporary Restraining Order is available to enforce it summarily. For another example, all general partners are trustees for all minority partners. There is zero tolerance for wrong-doing by managing partners. See, e.g., *NCAS Realty Management Corp. v. The Nat'l Corp. for Housing Partnerships,* 143 F.3d 38 (2nd Cir. 1998). In *NCAS Realty*, plaintiff, as in the case at bar, was local managing partner, and defendant, as in the case at bar, was an out-of-state partner. Defendant, as in the case at bar, counterclaimed for an accounting based on allegations of self dealing. The district court, as in the case at bar, dismissed Defendants' counterclaim.

The court of appeals reversed, ordering permanent access to the partnership books and records. This case is exactly on point.

For another example, concealment alone is a breach of a managing partner's duty to minority partners. *Jennison v. Bierer,* 601 F.Supp. 1167 (D.Vt. 1984). For another example, exclusion alone is a breach of that duty. *Williams v. Tritt,* 262 Ga. 173, 415 S.E.2d 285 (1992). Most importantly, the burden of proof is on the managing partner. *Konover Development Corp. v. Zeller,* 228 Conn. 206, 635 A.2d 798 (1994). And the law of Oklahoma incorporates all precedents regarding partnerships from all other UPA States, so all of the above are not merely advisory. 54 Okl.St. §204(4) and 205 (1981). The sum of the law is that a partnership is more like a marriage than a marketplace.

No conscientious and responsible court like the Tenth Circuit would have ruled as it did, affirming a self-contradictory opinion that disregards (or radically reinterprets) State law in a way that places the Tenth Circuit in conflict with all other circuits---unless it could place its decision outside the Anglo-American legal system of precedents. So that is what it did. It employed the simple expedient of declaring that its decision is "unpublished"---which means that it is published in Lexis/Nexis, Westlaw, and West's *Federal Appendix* but will not be considered to be law the next time an indistinquishable controversy arises between parties similar to those in the case at bar. "Law today, gone tomorrow."[2] This expedient enables the court below

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[2] Jennifer Adams, Comment, "Law Today: Gone Tomorrow," 53 *Baylor Law Review* 659 (2001).

to avoid tomorrow the logical consequences of its actions today.

Worse, there is no authority for the expedient of issuing precedents that are paradoxically not admitted to be precedents. There is no precedent in any decision of the Supreme Court. There is no statute authorizing the expedient. And there is no precedent in the common law. The expedient is not even authorized in any of the published rules of the 10th Circuit. (It seems that "unpublishing" by the court below is derived from an unpublished rule.)

Therefore, Petitioners have been directly and irreparably harmed by the "unpublishing system." Petitioners argue herein that the "unpublishing system" (which began only recently in 1973 and has mushroomed in recent years until it now subsumes 84% of all decisions issued by the circuit courts of

appeal)[3] violates Article III and the Due Process Clause of the Constitution. Furthermore, Petitioners will argue that the case at bar shows that the "unpublishing system" produces substandard decisions that have the appearance of impropriety.

Finally, Petitioners have attached their briefs before the court below, in Appendices "E" and "F," to show that both the UPA issues and the Constitutional issues were properly raised below in a timely fashion.

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[3]See especially David Cleveland, "Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System," 92 *Marquette Law Review* 686 (2009). This petition borrows heavily from Professor Cleveland's article, which is the most thorough and well researched authority on the main issue presented by the case at bar.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BY THE COURT BELOW IS IN CONFLICT WITH ALL OTHER CIRCUITS ON ALL FOUR QUESTIONS PRESENTED BY THE CASE AT BAR.

The decision of the court below is in conflict with all other circuits on all four of the questions presented for review by the case at bar. On all four questions, two or more courts have decided the same important legal issue in opposite ways.

First, and most important, on the important federal question of whether the courts of the United States may issue decisions that are outside the legal system of precedents, there is a split between the Eighth Circuit and the Ninth. The Eighth Circuit has followed Blackstone and held that we are still a common-law country and that precedents that are not admitted to be precedents are unconstitutional.

Anastasoff v. U.S., 223 F.3d 900 (8th Cir. 2000) (Arnold, J.).[4] The Tenth Circuit in the case at bar, on the other hand, has *sub silentio* followed the Ninth Circuit, which has explicitly rejected *Anastasoff* on all points. *In Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.), the most articulate statement in support of the "unpublishing system," the Ninth Circuit holds that (a) the unpublishing system is legal because Article III imposes no legal limits, because the Framers were "unclear." And (b), although unpublished opinions are admittedly less than "fully intelligible," still it is necessary to sacrifice the large majority of cases to give judges more time to improve the small minority, which are more important.

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[4]Although *Anastasoff* was vacated as moot after the IRS changed its position re Faye Anastasoff's request for a refund, at least two sub-sequent published opinions follow *Anastasoff*. See U.S. v. Goldman, 228 F.3d 942 (8th Cir. 2001) and U. S. v. Langmade, 236 F.3d 931 (8th Cir. 2001) (*per curiam*), which holds that "unpublished" decisions are binding precedent that district courts must follow.

These two opposite cases are the leading opinions on the most important question presented by the case at bar. If *Anastasoff* (2000) were discredited, Judge Kozinski would not have decided that his opinion in *Hart* (2001) is necessary. Although this conflict between circuits is not widespread and, like many important conflicts, could (and should) have been developed further, it nonetheless is current and very much a live issue. There are compelling reasons for invoking this Court's jurisdiction. It is the kind of question that can be decided only by the Supreme Court.

Second, on the question of whether a majority partner who has been held by a court of law to have (a) drafted and used "severely deficient" documents in a self-serving disputed transaction with minority partners, (b) shown "a general lack of credibility," or (c) come to court with "unclean hands" has fulfilled

the duties of a managing partner under the Uniform Partnership Act, the court below is again alone. (And the case at bar involves all three negative findings of fact about Respondents at the same time.) All other circuits and district courts in those circuits (and all State courts) follow *NCAS Realty Management Corp.*, 143 F.3d 38 (2nd Cir. 1998), which is exactly on point, or cases in the same line.

Third, regarding the question of what kind of "accounting" is required by the Uniform Partnership Act, the 10th Circuit is alone in holding that the mandatory accounting provision of the Uniform Partnership Act to protect minority partners is fully satisfied when the minority partner in a disputed transaction is allowed to sit in court to listen to the disputed, hostile testimony of a professional witness with whom he has never spoken, who was chosen

over his objections, and who was paid for his testimony only by the managing partner.

Fourth, the court below is alone in holding that an equitable remedy may be awarded to a party that is currently found by a court of law to have come to court with "unclean hands." The court below affirms the finding of "unclean hands" and simultaneously affirms the award of an equitable remedy to the unclean party. The stated reason for this decision of the court below is that, "In particular, we note that this argument was apparently not raised before the district court." Of course it was not raised there. Petitioners cannot raise the question of the contradictory nature of the district court's opinion before that opinion is entered. The court below was able to find no precedent for how it ruled on this question. That is because there is no precedent for what the court below did. (But under

the "unpublication system," courts are no longer bound by precedents.)

On all four questions presented by the case at bar, there is a clear, square, and irreconcilable conflict between the court below and all other circuit courts of appeal.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision of the court below, because it ignores State law in a diversity case, is inconsistent with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which holds that the courts of the United States must use State law as the rules for decisions in diversity cases. The alternative to granting this petition is to allow blatant federal-court nullification of State law, which this court historically has not permitted. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (citing *Erie* and summarily reversing the 10th Circuit's misinterpretation of State law).

III. THE DECISION BELOW IS ERRONEOUS IN THREE RESPECTS.

The 10th Circuit wisely does not want the radical weakening of the UPA that it permitted in the case at bar to become a precedent, because the decision is wrong in three respects:

(1) The precedent set in the case at bar would have a chilling effect on partnership formation, which is a mainstay of the economy. No one who has read the 10th Circuit's decision in the case at bar, to the extent it is a precedent (and it is even though they say it is not), would ever choose to become a minority partner in any business. Even if we say that the opinion below is not legal precedent, still it is available in Lexis, Westlaw, and West's *Federal Ap-pendix* for all to see that the 10th Circuit court of appeals allows practically unrestricted open hunting

season on minority partners in Colorado, Kansas, Utah, Oklahoma, New Mexico, and Wyoming.

(2) The 10th Circuit's weakening of the UPA is either very difficult or impossible to reconcile with the wording and intent of the UPA, and it is revealing that the courts below do not attempt to do so. They do not attempt to distinguish the case at bar from *NCAS Realty,* because they cannot do so. They just ignore *NCAS Realty* and thus avoid the problem. That is what unpublished opinions are for.

Perhaps the authors of the opinion below also believe, because they have avoided the problem and said nothing about the precedents they ignored, that what they did is insulated from review by this Court. It is not. But this kind of gaming is very bad for the legal system.

(3) The district court's opinion is self-contradictory. The court finds Respondents, on the

one hand, "severely deficient," "lacking in credibility," and "unclean" and then, on the other hand, awards to them that which can be awarded only to those who have met the burden of proving that they have fulfilled their statutory high duty to act as trustees toward their minority partners. That is just not logically possible. The Respondents cannot be "not A" therefore "A." They have to be one or the other.

The court below is correct that its precedent cannot and should not be "published."

IV. ALL JUDICIAL DECISIONS THAT ARE NOT LEGAL PRECEDENTS ARE UNCONSTITUTIONAL UNDER ARTICLE III.

The most important problem with the "un-publishing system" is not a practical one. The most important problem is that it is irreconcilable with Article III of the Constitution of the United States.

Article III delegates "[t]he judicial power," and nothing more, to the courts of the United States. Like most of the terms used in the Constitution (such as "habeas corpus," "felony," and "bill of attainder"), "the judicial power" is not further defined in the text. But it does not follow that whatever a judge does that is powerful is "judicial power." When a term is used in the Constitution that is not defined in the text, then its meaning is assumed and incorporated from received

jurisprudence--from the body of the common law as it stood when the Constitution was drafted in 1789.

> The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when The law was made . . . .
>
> ---1 William Blackstone, *Commentaries (1765)* 59 (1979).

In the words of Justice Scalia, the fairest and most rational method . . .

> treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated . . . , the fairly understood meaning of those words. -
>
> ---Antonin Scalia, "A Theory of Constitutional Interpretation," Speech at Catholic University of America (October 18, 1996).

To understand the Constitution, one must understand that the oracle of the common law in 1789 in America as well as in England was William Blackstone's *Commentaries on the Laws of England* (1st ed. 1765). For the Framers, the importance of

Judge Blackstone as the interpreter of the common law is difficult to overestimate. See, for example, *Schick v. United States*, 195 U.S. 65, 69 (1904), says:

> Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law . . . . At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly, the framers of the Constitution were familiar with it."[5]

The well-established, even unchallenged, common-law understanding of "the judicial power" in 1789 was that adherence to precedents is at the very core of what it means to be "judicial" and is what distinguishes "the judicial power" from the "the legisla-

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[5]See also R. Stone, "'We Inherit and Old Gothic Castle': Review of Blackstone's *Commentaries on the Laws of England* (1st ed. 1765, University of Chicago ed. 1979)," 8 *Hastings Constitutional Law Quarterly* 923 (Summer 1981); Herbert Storing, "William Blackstone," in *History of Political Philosophy* 622-634 (Leo Strauss and Joseph Cropsey eds., 3d ed. 1987); and Daniel Boorstin, "Introduction," *The Mysterious Science of Law: an Essay on Blackstone's Commentaries* 3-8 (1941).

tive power," which does not have to follow precedents. According to Blackstone, for all judges, "It is an established rule to abide by former precedents." *Commentaries* 69. The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia.[6]

There are two reasons why "the judicial power" requires adherence to precedents (until those precedents are carefully distinguished). First, inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law, which must be applied in subsequent similar cases. *Anastasoff v. I.R.S.*, 223 F.3d 898, 900 (Arnold, J.). For Blackstone, each judge exercises only the "judicial power, which is to examine the truth of the

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[6]Morton J. Horwitz, Transformation of American Law 8-9 (1977) "The equation of common law with a fixed, customary standard meant that judges conceived their role as merely that of discovering and applying preexisting legal rules . . . . The result of all this was a strict conception of precedent." Horwitz, *Transformation* at 8.

fact, [and] to determine the law arising upon that fact." 3 Blackstone, *Commentaries* 25. And "to determine the law" means not only choosing the appropriate legal principle but also expounding and interpreting it, so that . . .

> the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment . . . ."
>
> ---1 Blackstone, *Commentaries* 69.

The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "principal and most authoritative" guide to what the law is, the judicial power is limited by them. *Id.*

Blackstone was by no means unusual in deducing the legal system of precedents from the law-declaring nature of the judicial power. All

Anglo-American judges and students of the law were in agreement on this essential point. The doctrine that the system of precedents is derived from the law-declaring nature of the judicial power itself was familiar to the Framers also through the works of Sir Edward Coke, the author of a series of treatises published in four volumes as *The Institutes of the Law of England* (1628-1642),[7] which are foundational documents of the common law. Coke was the most admired and cited legal authority during the American Revolution.[8] The Framers identified Coke's struggle against the tyranny of the Stuarts with their own against King George. Coke emphasized precedent because it was his main

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[7]Coke's Institutes have been cited as authoritative by this Court in more than 70 cases, including *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), on the significance of "quickening," and in the Sugar Trust Case, *U.S. v. E. C. Knight Co.*, 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325 (1895) on the definition of monopoly.

[8] Bernard Bailyn, *The Ideological Origins of the American Revolution* 30 (1967).

weapon in the fight for the independence of the judiciary and to limit the king's prerogative rights.[9]

Coke tells us that a prior judicial decision on point is sufficient authority on a question of law because "a judicial decision is to the same extent a declaration of the law."[10] And . . . ,

> It is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."[11]

Likewise, Sir Matthew Hale agrees:

> Judicial Decisions do bind [and have their] Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is . . . ."[12]

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[9] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* 46 (1987).

[10] 4 Edward Coke, *Institutes of the Laws of England 138* (1642).

[11] 1 Coke, *Institutes* 51 (1628).

[12] Hale, *The History of The Common Law of England* 45.

The second reason why the "judicial power" necessary implies adherence to precedent is that it is essential, according to Blackstone, for the separation of legislative and judicial power. Blackstone teaches that the separation of powers is "one main preservative of the public liberty," and that the principal difference between the legislative power and "the judicial power" is a different attitude to precedent, "which, though "legislators may depart from, yet judges are bound to observe."[13] If judges had the legislative power to "depart from" established legal principles,

> the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions , and not by any fundamental principles of law . . . ," [14]

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[13]1 Blackstone, *Commentaries* 259.

[14]Id.

as in the case at bar. In the words of Justice Scalia again,

> If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to "taking Care that the Laws be faithfully executed," Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of "the Executive power" may be familiar to other legal systems, but is alien to our own. So also, I think, "the judicial Power of the United States" conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition.
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> --*James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, Marshall, Blackmun, JJ., concurring)

No American legal thinker and no American court of law opposed Blackstone on this very important understanding of the judicial power.

That the Framers of the Constitution of the United States agreed with their mentors on the nature of the judicial power---and the doctrine of precedent implicit in it---is a necessary inference from the text of the Constitution, but it is more than that also. They wrote clearly on the subject. Alexander Hamilton, in "The Federalist No. 81," argues that a court, to the extent it is exercising the judicial power, "pronounces the law" rising upon the facts of each case. He explains the law-declaring concept of judicial power with the word "jurisdiction": "This word is composed of JUS and DICTIO, *juris dictio*, or a speaking and pronouncing of the law." *Ib.* Following Blackstone, Hamilton writes that "[t]he courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. "The Federalist

No. 78," 232-32. Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ." *Id.*

And Hamilton, again following Blackstone, discusses in "The Federalist No. 78" the importance of the separation of powers. "There is no liberty, if the power of judging be not separated from the legislative [power]." "The Federalist No. 78," 230. The principal difference between the two powers is that judges must follow precedents:

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived . . . that the records of those precedents must unavoidably swell to a very considerable bulk, and must

> demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.
>
> ---"The Federalist No. 78," *American State Papers* 233

Chief Justice Roberts, during his confirmation hearings, when asked about the nature of precedent, replied by citing Hamilton as the authoritative interpreter of Article III:

> As Alexander Hamilton explained in *Federalist No. 78*: 'To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.
>
> ---Letter from Judge John Roberts to Sen. Arlen Specter, Senate Judiciary Committee (September 21, 2005)

And Justice Alito similarly invoked Hamilton's *Federalist No. 78* during his own confirmation process:

> In all the areas that you mentioned, there is now a considerable body of case law, and that is a real limitation on the exercise of judicial power. That is one of the important reasons for the doctrine of *stare decisis*. In the *78th Federalist Paper*, when Alexander Hamilton was responding to the people who were worried about this power of judicial review, who thought that it would give the judiciary too much power, he specifically cited the fact that members of the judiciary would be bound up by precedent, and this would restrain them. This would keep them from injecting their own views into the decision-making process.
>
> ---Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary, 109th Cong. 526 (2006).

Likewise, James Madison, the "Father of the Constitution," recognizes "the obligation arising from

judicial expositions of the law on succeeding judges."[15] Madison, following Blackstone, sees the legal system of precedents as a principal safe-guard against tyranny. Madison expects that the accumulation of precedents would be beneficial: "Among other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[16]

Likewise, James Wilson, a prominent scholar of law among the Framers, a delegate to the Constitutional Convention, and one of the six original justices of the Supreme Court, follows Blackstone:

> Judicial decisions are the principal and most authentic evidence, which can be

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[15] "Letter from Madison to Charles Jared Ingersoll (June 25, 1831)."

[16] "Letter to Samuel Johnson" (June 21, 1789).

> given,[of what the law is.] "As such, every prudent and cautious judge will appreciate them . . . . He will remember, that his duty and his business, is not to make the law, but to interpret and apply it." [17]

Likewise, Chancellor Kent, who developed the law of equity in the United States, follows Blackstone.

> Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason . . . .[18]

Justices Scalia, Stevens, Thomas, and Breyer elaborate:

> The near-dispositive strength Blackstone accorded *stare decisis* was not some mere personal predilection. Chancellor Kent was of the same view: "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have *a right* to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by

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[17] 2 *The Works of James Wilson* 502 (1967).

[18] James Kent, Lect. XXI, "Of Reports of Judicial Decisions," 1 *Commentaries on American Law* 440-441.

> it." 1 J. Kent, *Commentaries* 475-476 (emphasis added). See also Hamilton's statement in The Federalist: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *The Federalist No. 78*, p. 471 (C. Rossiter ed. 1961).
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> ---*Rogers v. Tennessee*, 532 U.S. 451, 473, n. 2 (2001) (dissenting)

In the words of Judge Richard Arnold,

> To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.
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> ---*Anastasoff v. U.S.*, 223 F.3d 898, 903 (8th Cir. 2000) (Arnold, J.), *moot on other grounds*, 235 F.3d 1054

V. ALL JUDICIAL DECISIONS THAT ARE NOT LEGAL PRECEDENTS ARE UNCONSTITUTIONAL UNDER THE DUE-PROCESS CLAUSE.

The Fifth Amendment to the Constitution of the United States provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Judicial decisions that are paradoxically not admitted to be legal precedents violate the legal principle of *stare decisis*. The doctrine of *stare decisis* is the hallmark of a system of laws. *Ex Parte Bollman*, 8 U.S. [4 Cranch] 75, 41-92 (1807)

The right to a fair trial, as embodied in the requirement that courts should be bound to rely upon prior decisions (or to distinguish them or change the law), is a "fundamental right" and "basic value" "implicit in the concept of ordered liberty" as set forth in the Constitution and intrinsic to our judicial

system. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring). And, "classifications affecting fundamental rights are given the most exacting scrutiny" *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The expedient of issuing decisions that are outside the legal system of precedents infringes upon a fundamental right and must, therefore, be subject to strict scrutiny and justified by showing that the action is the least-burdensome means of achieving a compelling interest. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted . . . , classifications which might invade or restrain them must be closely scrutinized and carefully confined.") The practice of declaring opinions in advance to hold no weight as precedents is not the least burdensome means of achieving any compelling state interest. David R.

Cleveland, "Overturning the Last Stone: the Final Step in Returning Precedential Status to All Opinions" 10 *J. App. Practice and Process* 61, 155.

This Court's case law under the Due Process Clause makes clear that there is a "duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions" and that this requirement serves "not only to ensure abstract fair play to the individual" but also "[i]t's purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

Likewise, this Court has a long history of protecting deeply rooted common-law judicial procedures, often finding that abrogation of these procedures violates litigants' due-process rights. For

example, in a parallel case, *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), this Court held that denying a well-established common-law procedure was a violation of due process. In that case, this Court ruled that judicial oversight of punitive-damage verdicts remained a part of common law from 1763 to the present. *Id.*, at 421-29. And, therefore, Oregon's statute denying remitter violated due process. *Id.*, at 430. The common-law practice of referring to past cases as establishing the governing law stretches back much further and is of far more fundamental importance to the integrity of the American legal system than is judicial oversight of punitive-damage awards. Lance A. Wade, Note, "*Honda* Meets *Anastasoff*: The Procedural Due Process Argument against Rules Prohibiting Citation to Unpublished Judicial Decisions," 42 *B. C. L. Rev.*, 695, 723-32 (2001).

VI. ALL JUDICIAL DECISIONS THAT ARE NOT LEGAL PRECEDENTS ARE UNCONSTITUTIONAL UNDER THE DOCTRINE OF EQUAL PROTECTION.

This Court has made clear that there is an equal-protection component to the Due Process Clauses of the Constitution.[19] It is a fundamental purpose of a legal system to provide predictability. The definition of predictability is "equality for equals, inequality for unequals,"[20] i.e. similarly situated litigants will be treated the same way. A government that aspires to have a legal system must at least aspire to predictability. A government that permits judicial decisions that are not admitted to be precedents has abandoned that aspiration.

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[19]See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974).

[20]"Justice is equality, but only for equals; and justice is inequality, but only for those who are unequal." Aristotle, "The Politics" 1282b, 9 *Great Books of the Western World* (1952) 480.

The new attitude is apparent in a pair of recent Cases in which the Dallas Area Rapid Transit authority (DART) received diametrically opposed decisions from the Fifth Circuit without explanation in a span of just three years. In 1998 in *Anderson v. DART*, the district court for the Northern District of Texas held that "DART is a political subdivision of the State of Texas, and is therefore immune under the Eleventh Amendment from lawsuits,"[21] and the Fifth Circuit affirmed---in an unpublished opinion. When the Supreme Court denied *certiorari* in this case, DART must have felt about as secure as possible that the rule was settled. Yet when the district court applied this rule again in the year 2000, in *Williams v. DART*, this time the Fifth

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[21] *Anderson v. Dallas Area Rapid Transit*, No. CA3:97-CV-1834-BC, 1998 U.S. Dist. LEXIS 15493, at *24 (N.D. Tex. Sept. 29, 1998), *aff'd* per curiam, *Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (*per curiam*) (unpublished), *cert. denied*, 528 U.S. 1062 (1999).

Circuit held that DART was not immune under the Eleventh Amendment from lawsuits.[22] The Fifth Circuit in *Williams* was wholly dismissive of the prior result in *Anderson* and in two similar cases.[23] So, only because the prior case, which held that DART is immune, was "unpublished," it was not accorded precedential weight, and the court felt free to depart from it without distinguishing it in some fashion (which it could not do because the legally relevant facts were identical)---or even overruling the law on which the case was based.[24] (In the case at bar, the circuit court did not attempt to distinguish the precedents on point under the Uniform Partnership Act cited above, such as *NCAS*

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[22] *Williams v. DART*, 242 F.3d 315, 318-19 (5th Cir. 2001).

[23] "Although all three cases upheld DART's immunity from suit, they are neither binding nor persuasive in this context." *Williams v. DART*, 242 F.3d at 319 (5th Cir. 2001).

[24] *Williams*, 242 F.3d at 322.

Realty Management Corp., 143 F.3d 38 [2nd Cir. 1998] and did not attempt to overrule them.) Two identical cases decided within two years were decided differently based not on factually distinguishable factors or a change in the governing law, but merely the whim of one panel choosing not to publish. Not only was the defendant similarly situated in each case, but also as far as legally relevant facts go, it was *identically* situated. As Judges Smith, Jones, and DeMoss wrote in their vigorous dissent,

> What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do?[25]

What happened to DART and the Petitioners in the case at bar are not isolated examples. In fact, they may be common.

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[25] *Williams*, 256 F.3d at 261.

> "Empirical evidence suggests that cases such as . . . *Anderson* are more common than one might think."[26]

"Lord Mansfield frequently observed, that the certainty of a rule was often of much more importance in mercantile cases than the reason of it." 1 Kent, *Commentaries* 444. In the case at bar, Petitioners relied on the settled law of partnerships exemplified by *NCAS Realty Management Corp.*, 143 F.3d 38 (2nd Cir. 1998), when they entered into, and then remained in, a partnership with the Respondents. If Petitioners could have known in advance that the Tenth Circuit would later declare open season on minority partners, they would easily have adapted and chosen a different investment vehicle.

In sum, the practice of designating some opinions as outside the legal system of precedents

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[26] *Williams*, 256 F.3d at 262.

violates the doctrine of equal protection because, on its face, it fails to treat equals equally. This unequal treatment inhibits a fundamental right, and the government's pragmatic justifications for the practice are insufficient to meet the "strict scrutiny" standard required by this Court in cases of violations of fundamental rights.

VII. DECISIONS THAT ARE NOT LEGAL PRECEDENTS TEND TO BE SUB-STANDARD AND TO HAVE THE APPEARANCE OF IMPROPRIETY.

Justice John Paul Stevens, the most outspoken and most principled living judicial opponent of the "unpublication system," spoke to the Illinois State Bar Association[27] about the problem in 1976, when that system had just begun:

> A rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania, that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.[28]

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[27] See David R. Cleveland, "Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System," 92 *Marquette L. R.* 685.

[28] Remarks at the Illinois State Bar Association's Centennial Dinner (January 22, 1977), quoted in "Brief for the Chicago Council of

Justice Stevens has spoken out early and often about the dangers of issuing precedents that are not admitted to be precedents.

> Q: Is the decision to grant or deny cert. influenced by whether the opinion from the court below is a published or nonpublished opinion?
>
> A: [Justice Stevens]: Well, I tend to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.
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> ---Jeffrey Cole and Elaine E. Bucklo, "A Life Well Lived: An Interview with Justice John Paul Stevens," 32 *Litig.* 8, 67 (2006).

Not only are "unpublished" opinions used when the decision is "a little hard to justify." Also, the "unpublication system" invites gaming of the system by circuit-court judges. One obvious concern is that the courts of appeal can use unpublication to

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Lawyers as Amicus Curiae Supporting Petitioner at 3, *Browder*, 434 U.S. 257 (No. 76-5325), 1977 WL 189280.

insulate their decisions from review by this Court. Several circuit-court judges have written about their first-hand observations of misuse of unpublished opinions. See Patricia M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings," 62 *U. Chi. L. R.* 1371, 1374 (1995) (discussing her observations as a judge on the D.C. Circuit); and Richard S. Arnold, "Unpublished Opinions: A Comment," 1 *J. of App. Prac. and Proc.* 219, 219 n. 1 (1999) (discussing his observations as a judge of the Eighth Circuit).

Justice Ginsburg has warned us that "[a] limited publication rule, however sensible its purpose, is susceptible of misuse." The abuse she had in mind was that a judge or panel might "resort to an unpublished, abbreviated disposition to conceal or avoid a troublesome issue" (as in the case at bar). Ruth Bader Ginsburg, "The Obligation to Reason

Why," 37 *U. Flor. L. Rev.* 205, 222 (1985). Another kind of abuse is that courts of appeal can use the unpublishing system to protect themselves from review by this Court.

Several justices of this Court have expressed deep concern over the relentlessly increasing number of "unpublished" decisions that are not admitted to be precedents. (The proportion has now reached a staggering 84%.)

> In ever-increasing numbers, appeals throughout the federal system are being decided in this anonymous fashion. It is not uncommon for courts of appeals to issue opinions that are not to be cited as authority in other cases. In one recent published case---which was sufficiently important to induce this Court to grant certiorari even before a conflict in the circuits had developed—the court purported to justify such an *ad hoc* adjudication by asserting that it lacked "precedential character." The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal

> judicial system is far more serious than is generally recognized.
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> ---*Bd. of Educ. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissent, joined Brennan and Marshall, JJ's) (reproaching the Second Circuit over its recent use of an unpublished decision in *Rowley v. Board of Ed.*, 632 F.2d 945, 948, n. 7 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982)

One six-month study of cases in the D. C. Circuit found that forty percent of unpublished cases arguably met the publications standards, and Judge Wald of that court indicates that the proportion is now higher. Why? In her words, "[A] double-track system allows for deviousness and abuse." Patricia M. Wald, *supra*, 62 *University of Chicago Law Review* 1371, 1374 (1995).

A sea change in the American legal system has occurred without consideration by the Supreme

Court. "How did we get here? Where are we going?," asks Justice Alito.[29] A chorus of concerned voices has been raised in the legal community about the propriety of the change.[30]

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[29]Justice Samuel A. Alito, "How Did We Get Here? Where Are We Going?," Keynote Address at Washington and Lee University School of Law, Law Review Symposium: "Have We Ceased to Be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn, and *Per Curiam* Opinions," SSA-017109 (March 18, 2005), available at http://www.law.com/pdf/dc/ alito_unpublished.pdf.

[30]For example: Pamela Foa, Comment, "A Snake in the Path of the Law: the Seventh Circuit's Non-Publication Rule," *University of Pittsburgh Law Review* 309 (1977); W. Richman and W. Reynolds, "Elitism, Expediency, and the New *Certiorari*: Requiem for the Learned Hand Tradition," 81 *Cornell L. Rev.* 273, 284 (1996); Tony Mauro, "Stealth Decisions under Fire," *Legal Times* (September 4, 2000); Jennifer Adams, Comment, "Law Today: Gone Tomorrow," 53 *Baylor Law Review* 659 (2001); Thomas Healy, "*Stare Decisis* as a Constitutional Requirement," 104 *West Virginia Law Review* 43 (2001); Deborah Jones Merritt and James J. Brudney, "Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals," 54 *Vanderbilt Law Review* 71 (2001); William J. Miller, Note, "Chipping away at the Dam: *Anastasoff v. United States* and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond," 50 *Drake Law Review* 181 (2001); Sheree L. K. Nitta, Note, "The Price of Precedent: *Anastasoff v. United States*," 23 *Hawaii Law Review* 795 (2001); Suzanne O. Snowden, "That's My Holding and I'm Not Sticking to it!: Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law," 79 *Washington University Law Quarterly* 1253 (2001); Jon A. Strongman, Comment: "Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional," 50 *University of Kansas Law Review* 195 (2001); Lance A. Wade, Note, "*Honda* Meets *Anastasoff*: the Procedural Due Process Argument against Rules Prohibiting Citation to Unpublished Judicial Decisions," 42 *Boston College Law Review* 695 (2001); Stephen R. Barnett, "From *Anastasoff*

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. Indeed, one must feel sympathy for the appellate-court judges who only recently in our

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to *Hart* to West's *Federal Appendix*: The Ground Shifts under No-Citation Rules," 4 *Journal of Appellate Practice and Process* 1, 1-2 (2002); Charles R. Eloshway, "Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers," 70 *George Washington Law Review* 632 (2002); Kenneth Anthony Larett, "Precedent, Judicial Power, and the Constitutionality of 'No-Citation' Rules in the Federal Courts of Appeals," 54 *Stanford Law Review* 1037 (2002); Johanna S. Schiavoni, "Who's Afraid of Precedent?: the Debate over the Precedential Value of Unpublished Opinions," 49 *UCLA Law Review* 1859 (2002); Steve Sheppard, "The Unpublished Opinion: How Richard Arnold's *Anastasoff* Opinion is Saving America's Courts from Themselves," 2002 *Arkansas Legal Notes* 85 (2002); Richard B. Cappalli, "The Common Law's Case against Non-Precedential Opinions," 76 *Southern California Law Review* 755 (2003); Michael B.W. Sinclair, "*Anastasoff* versus *Hart*: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions," 64 *University of Pittsburgh Law Review* 695 (2003); Tony Mauro, "Unpublished Opinions: Inedible Sausage or Crazy Uncle?, *Legal Times* (April 12, 2004); Penelope Pether, "Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts," 56 *Stanford Law Review* 1435 (2004); Penelope Pether, "Take a Letter, Your Honor: Outing the Judicial Epistemology of *Hart v. Massanari*," 62 *Washington and Lee Law Review* 1553, 1557 (2005); Erica S. Weinberger, "Unpublished Opinions: A Convenient Means to an Unconstitutional End," 97 *The Georgetown Law Journal* 621-655 (2009); David R. Cleveland, "Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions," 10 *Journal of Appellate Practice and Process* 61 (2009); and David R. Cleveland, "Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System," 92 *Marquette Law Review* 686 (2009).

history, and against their wishes, feel compelled to disregard Constitutional mandates and citizens' rights because of unduly high judicial case loads and pressures of time. The return to the Constitution requested in the case at bar should be the occasion for a concerted appeal for greater Congressional funding of the judiciary and the appointment of additional federal judges.

> We do not have time to do a decent enough job, the argument runs, when put into plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.
>
> ---*Anastasoff v. U.S.*, 223 F.3d 900, 904 (8th Cir. 2000)

The price must still be paid. As Laurence Tribe, the famous constitutional-law scholar and opponent of

the unpublication system, has noted, "[t]he Constitution cannot be cabined in any calculus of costs and benefits."[31]

In sum, the "ever-increasing number" of "unpublished" decisions comprise a large and fast-growing majority of all decisions issued by the courts of appeal, and such decisions have been described by respected legal authorities as "resting on a false premise," unprecedented, ill-justified, "impersonal," "bureaucratic," "a threat to the quality of our work," "susceptible of misuse," "allowing deviousness and abuse" and unconstitutional. They are, as in the case at bar, "a device to reach a decision that might be a little hard to justify" and are used "to conceal or avoid a troublesome issue." If so, the entire federal judicial system "is indeed in serious trouble."

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[31] Laurence H. Tribe, "Constitutional Calculus: Equal Justice or Economic Efficiency?," 98 *Harvard Law Review* 592, 592 (1984).

VIII. THE MAIN QUESTION PRESENTED BY THE CASE AT BAR IS TOO IMPORTANT TO BE DECIDED BY A LOWER COURT.

Petitioners have argued that the case at bar represents a conflict between circuits on all four questions presented. But even if there were no split at all among the circuits and all of the courts of appeal are employing the expedient questioned in this Petition, this Court's Rule 10(c) provides for granting a petition for certiorari in cases that present issues of national importance, for which there are compelling reasons for invoking this Court's jurisdiction.

> [T]he Court considers [whether] . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . .

The main question presented by the case at bar is the constitutionality of the expedient of issuing pre-

cedents that are paradoxically not admitted to be precedents, that are outside the Anglo-American legal system of precedents. This question so far has been decided in the Tenth Circuit by a three-judge panel, as it denied a motion for rehearing---without giving a single reason, authority, or precedent for its decision. This question recurs in all circuit courts on a daily basis, in fact many times each day. It is obvious that this question is an important federal question, an issue of national importance (in fact, a national scandal), for which there are compelling reasons for invoking this Court's jurisdiction. This Court has not yet ruled on it.

Petitioners in the case at bar informally but in effect represent 84 percent of all litigants in all federal courts. The case at bar is in effect a class action, with Petitioners representing tremendously important principles, upon which are based the

plans, hope, and aspirations of a great many people throughout this country. The case at bar is nothing less than the most important procedural case that has come before this Court since *Erie v. Tompkins* in 1938.

CONCLUSION

THEREFORE, for all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 2009 *Attorneys for Petitioner*